86-1248

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES CURTIS,
Petitioner,

v.

STATE OF ILLINOIS,
Respondent.

WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

APPENDIX

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The PEOPLE of the State of Illinois, Appellant,

v.

James CURTIS et al., Appellees.

No. 61819.

Supreme Court of Illinois.

June 20, 1986.

Rehearing Denied Sept. 26, 1986.

Justice SIMON delivered the opinion of the court:

Defendants, James Curtis and Andrew Ryder, were convicted in a bench trial in the circuit court of Cook County of armed robbery (Ill.Rev.Stat.1981, ch. 38, par. 18-2). The appellate court reversed the convictions and remanded for a new trial. (132 Ill.App.3d 241, 87 Ill.Dec. 170, 476 N.E.2d 1162.) We allowed the State's petition for leave to appeal (94 Ill.2d R. 315).

On July 18, 1979, two men entered a liquor store on the south side of Chicago shortly before closing time. After pretending to inspect the merchandise, they announced a stickup. Four store employees, manager Thomas Buckle, cashier Rosalind Harris, stock man Greg Webb, and part-time security guard Fred Kinnie, were present at the time. One robber put a gun in Kinnie's back, then removed Kinnie's gun from its holster, unloaded it, threw the shells over a rack, and returned the gun to the holster. He continued to stand near Kinnie throughout the incident. The second robber ordered the other three employees to the back of the store. He told Harris and Webb to face the back door and then forced Buckle to lead him through the store to an of-

fice desk containing money, the safe, and the cash registers. After taking money from the desk and the registers (the safe could not be opened), that robber placed Buckle, Harris, and Webb in a storage room, and his partner did the same with Kinnie. With orders to the employees not to emerge for at least 15 minutes, the offenders fled. The incident had lasted somewhere between 15 and 30 minutes.

Some 19 months later, in February 1981, Richard Julien, an inspector with the internal affairs division of the Chicago fire department, learned that defendant Ryder, a fire department captain also with the internal affairs division, might have been involved in the liquor store robbery. This intelligence came from another fire department inves-

tigator who was a friend of the liquor store security guard, Fred Kinnie; Kinnie was also employed by the fire department at the time. Julien presented a photographic array to store manager Buckle which included Ryder's picture. After Buckle made a tentative identification of Ryder, Julien brought the allegations to the attention of the police department.

Police officers subsequently showed a photo spread including defendant Ryder to witnesses Buckle and Harris. Both witnesses made tentative identifications of Ryder. The witnesses were also shown a spread which included a picture of defendant Curtis. Although the record does not disclose why suspicion had focused on Curtis, it is likely that the allegations against him originated with Kinnie. With

respect to Curtis the evidence is in conflict, but it appears that any identification of Curtis at that point was at best tentative.

A week later, on February 17, 1981, Kinnie made a statement to police officers and an assistant State's Attorney naming the defendants as the two robbers and implicating himself as an "inside man" in the robbery. Later the same day, store manager Buckle swore out complaints against Curtis and Ryder; a circuit judge found there was probable cause for filing the complaints and issued warrants for their arrest. Within several hours of being arrested, each defendant stood in two lineups, one viewed by Buckle and the other by liquor store employee Greg Webb. Neither defendant was represented by

counsel at the lineups. Buckle identified both defendants in the lineups. The record is not clear on whether Webb made any identification, but was never called to testify. Several days later Harris was shown photographs of the defendants' lineups and identified both Curtis and Ryder.

Trial of the case occurred approximately 2 1/2 years after the arrests. Prior to the trial, the circuit judge suppressed Buckle's lineup identification of Ryder on the ground that Ryder's sixth amendment right to counsel at the lineup had been violated; however, Buckle's lineup identification of defendant Curtis was not suppressed because the judge found that Curtis had waived his sixth amendment right.

At trial the evidence against the defendants consisted of the testimony of Buckle, Harris, and Kinnie. The State's case included in-court identifications by Buckle and Harris of each defendant, Buckle's identification of Curtis at the lineup, and Harris' identification of both defendants from lineup photographs. In addition, both witnesses testified to making tentative identifications from the prelineup photo arrays. Kinnie repeated his story that he had collaborated in the robbery with the two defendants.

The appellate court agreed with the trial court that the defendants' sixth amendment right to counsel attached upon the filing of criminal complaints and that the defendants were therefore entitled to have attorneys present at the

lineups. The appellate court held, however, that the trial judge's finding that Curtis had waived the right was against the manifest weight of the evidence and that Curtis, like Ryder, was entitled to suppression of Buckle's lineup identification. Moreover, the appellate court believed that United States v. Wade (1967), 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, and Gilbert v. California (1967), 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178, mandated the suppression not only of Buckle's lineup identification of the defendants, but also in-court identifications by both witnesses and all other identification evidence. Since the only remaining evidence tying the defendants to the robbery was the testimony of Kinnie, whose credibility was subject to

impeachment, the appellate court concluded that the error in admitting the identifications was not harmless and that a new trial was required.

We need not pass upon the propriety of the appellate court's views as to the necessity of counsel at the lineups or Curtis' alleged waiver of the right. Even assuming that the appellate court's resolution of these questions was correct, its application of the Wade-Gilbert exclusionary rule was erroneous. Under a correct application of the principles articulated in those cases, any error resulting from the uncounseled lineups was harmless beyond a reasonable doubt.

A lineup which is held after the initiation of "adversary judicial criminal proceedings" without the presence of

counsel for the accused is unconstitutional. (Kirby v. Illinois (1972), 406 U.S. 682, 639, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411, 417.) Once it has been determined (or as here assumed) that a lineup violates the sixth amendment right to counsel, any evidence adduced by the prosecution that a witness identified the defendant at the lineup is subject to a per se rule of exclusion. (Gilbert v. California (1967), 388 U.S. 263, 273, 87 S.Ct. 1951, 1957, 18 L.Ed.2d 1178, 1186; Moore v. Illinois (1977), 434 U.S. 220, 231, 98 S.Ct. 458, 466, 54 L.Ed.2d 424, 436.) However, an in-court identification may be permitted even when it follows an uncounseled lineup if the State can establish by "clear and convincing evidence that the in-court identifica-

tion[] [was] based upon observations of the suspect other than the lineup identification." (United States v. Wade (1967), 388 U.S. 218, 240, 87 S.Ct. 1926, 1939, 18 L.Ed.2d 1149, 1164; see also People v. Fox (1971), 48 Ill.2d 239, 245-46, 269 N.E.2d 720; Frisco v. Blackburn (5th Cir.1986), 782 F.2d 1353; United States v. Anderson (7th Cir. 1983), 714 F.2d 684.) If either a lineup or an in-court identification is improperly admitted, a new trial is required unless the State can prove that the error was harmless. Gilbert v. California (1967), 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178.

In this case, the Wade-Gilbert principles must be applied to three types of evidence admitted at trial: Buckle's testimony that he identified Curtis at

the lineup, Harris' testimony that she identified both defendants from pictures of the lineups, and the in-court identifications of both defendants made by Buckle and Harris.

I. THE LINEUP IDENTIFICATION TESTIMONY

Because the trial judge granted Ryder's motion to suppress, there was no evidence presented that Buckle had picked him out of a lineup. Ryder concedes that the appellate court's contrary view of the record is mistaken. Buckle was permitted to testify, however, that he told the police at Curtis' lineup that Curtis resembled the man involved in the robbery. Assuming that the uncounseled lineup violated the defendant's sixth amendment right, Gilbert requires that this testimony by Buckle be excluded.

(Gilbert v. California (1967), 388 U.S. 263, 273, 87 S.Ct. 1951, 1957, 18 L.Ed.2d 1178, 1186.) Whether the admission of this testimony affected the outcome of the trial is considered later in this opinion.

II. HARRIS' IDENTIFICATION FROM LINEUP PHOTOGRAPHS

The defendants argue that the pre-trial identifications made by Harris from photographs of the lineups are direct fruits of the allegedly unconstitutional lineups and that her testimony as to those identifications was therefore not admissible. As the defendants see it, by using the lineup photographs in this way the State can circumvent the exclusionary rule laid down in Gilbert and make the trier of fact aware that an accused was

picked out of a lineup. The State responds that these pictures of the lineups, like other photos shown by the police to witnesses, may be utilized without the presence of counsel for the accused.

A per se rule excluding testimony that the accused was identified at an uncounseled lineup may be the only "effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." (Gilbert v. California (1967), 388 U.S. 263, 273, 89 S.Ct. 1951, 1957, 18 L.Ed.2d 1178, 1186.) By contrast, when the testimony concerns only an identification from a picture of the lineup, exclusion is not critical to effectuating

the sixth amendment right. Since in-person lineup identifications are more accurate (Simmons v. United States (1968), 390 U.S. 377, 386 n.6, 88 S.Ct. 967, 972 n.6, 19 L.Ed.2d 1247, 1254 n.6) and therefore more probative than photographic identifications, the police and the prosecution are unlikely to attempt to undercut the right to counsel by routinely foregoing the witness' actual presence in favor of merely showing the witness a picture of a simulated lineup.

Although the photographs here were taken at lineups, Harris' testimony was not "'come at by exploitation of [the primary] illegality'" (Gilbert v. California (1967), 388 U.S. 263, 273, 87 S.Ct. 1951, 1957, 18 L.Ed.2d 1178, 1186, quoting Wong Sun v. United States (1963),

371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441, 455). The primary illegality was allowing Buckle to make lineup identifications in the absence of counsel for the defendants. That illegality was irrelevant to Harris' later identification of the defendants from the photographs. From the viewpoint of Harris' identifications, the lineup photographs were no different than any other pictures or arrays of multiple suspects which the police could have constructed. The State can clearly obtain and use pictures of suspects without their lawyers being present, and we see no difference of constitutional magnitude between a single picture of several persons standing together and individual pictures of each. See People v. Lawrence (1971), 4 Cal.3d

273, 93 Cal.Rptr. 204, 481 P.2d 212.

Moreover, defendants offer no suggestion as to how their lawyers' presence at the lineups could have aided them at trial with regard to Harris' identifications from the photographs; the attorneys' ability to cross-examine the witness would not have been any greater if they had been present when the lineup pictures were taken. (Cf. United States v. Ash (1973), 413 U.S. 300, 312-13, 93 S.Ct. 2568, 2575, 37 L.Ed.2d 619, 628.) It should also be noted that defendant Ryder's concern that the trier of fact was indirectly apprised of the suppressed lineup through Harris' testimony is somewhat disingenuous where, as here, the case was tried by the judge who also presided at the suppression hearing. We

conclude that the trial judge did not err in permitting Harris to testify to her identifications from the lineup photographs.

III. THE IN-COURT IDENTIFICATIONS

The appellate court decided that the in-court identifications of the defendants by Buckle and Harris had to be excluded whether or not those identifications had a source independent of the uncounseled lineups because, the court reasoned, the in-court identifications were tainted by references to the lineup and lineup photographs. This conclusion misreads the Supreme Court's decision in Gilbert; there the court explicitly held that while testimony concerning the uncounseled lineup identifications had to

be excluded, the in-court identifications could be admitted if the State established by clear and convincing evidence that they had an independent basis. Gilbert v. California (1967), 388 U.S. 263, 272-73 87 S.Ct. 1951, 1956, 18 L.Ed.2d 1178, 1186.

In this case, the independent-basis inquiry need only be undertaken with respect to Buckle's in-court identifications since the question only arises when an unconstitutional pretrial identification intervenes between the crime and the in-court testimony. In view of our conclusion that Harris' identifications from the lineup photographs were constitutionally unobjec-tionable, it follows that her in-court identifications were properly admitted.

To decide whether Buckle's in-court identifications had an origin independent of the uncounseled lineups, several factors must be considered, including "the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification." United States v. Wade (1967), 388 U.S. 218, 241, 87 S.Ct. 1926, 140, 18 L.Ed.2d 1149, 1165.

The independent-basis determination can be made by a reviewing court where

the record permits an informed judgment (United States v. Anderson (7th Cir. 1983), 714 F.2d 684, 687; People v. Davis (1970), 45 Ill.2d 514, 517, 261 N.E.2d 314; see e.g., People v. McDonald (1975), 62 Ill.2d 448, 343 N.E.2d 489; People v. Fox (1971), 48 Ill.2d 239, 269 N.E.2d 720), and the court may find a sufficient alternative foundation for the in-court identification "even where a small number of these factors are present." (United States v. Anderson (7th Cir.1983), 714 F.2d 684, 686.) The record in this case allows an informed judgment, and evaluation of the Wade factors demonstrates convincingly that Buckle's in-court identifications were based on his observations during the robbery, not on seeing the defendants at the uncounseled line-

ups.

The first Wade factor, the opportunity to observe the incident, strongly suggests an independent basis for the identifications. Between 15 and 30 minutes elapsed from the time the robbers entered the store to the time they shut the employees in the storage room. There was excellent fluorescent lighting throughout the store. Although Buckle was not able to view either perpetrator for the entire time, he had ample opportunity to see both. Buckle observed both looking at merchandise and asked the person he later identified as Ryder whether he could help him. At that point, Buckle and Ryder were standing "toe to toe." He was also able to see Ryder from 20 feet away when Ryder pulled a gun on Kinnie,

and later when he walked to the front of the store where the cash registers were located.

Buckle's chance to view the other robber was only slightly more limited. After the robbers announced a stickup, the person Buckle identified as Curtis put an gun to his back and followed him first to the back of the store and then to the various places where money was kept. However, Buckle did not see Curtis before the robbery was announced, as well as when Curtis subsequently stood between Buckle and the other employees holding a gun on them. He testified that he had occasion to confront Curtis face to face.

The descriptions of the two robbers which Buckle gave to the police closely matched the defendants' actual descrip-

tions. Buckle told the police that one of the robbers was a white male in his fifties, five-eleven or six feet in height, heavyset (by which he testified that he meant 200 to 210 pounds), with gray or salt-and-pepper hair. At the time of his arrest 19 months later, Ryder was 55 years old, six feet tall, weighed 200 pounds, and had gray hair. Buckle's description of the other suspect was that he was black, approximately six feet tall, weighed 215 pounds and had slightly reddish hair. According to the arrest report, Curtis is black, six-two, weighs 230 pounds and has brown hair. The contention by defendants that these descriptions were too vague to be useful is plainly without merit. At issue is not whether the witness has offered a de-

scription which points only to the accused but whether significant discrepancies existed between the actual descriptions and those initially given to the police. Although tape-measure accuracy is not required, that is essentially what Buckle provided. No substantial discrepancy existed between the descriptions.

The next three Wade factors concern prelineup identification by the witness. An in-court identifications is more likely to have a source independent of an uncounseled lineup if the witness identified the defendant on a prior occasion, never identified anyone else, and never failed to identify the defendant when given the opportunity to make an identification.

Buckle was first presented with an

array of 10 pictures, including one of Ryder, by the first department inspector. Buckle initially selected Ryder's picture, saying something to the effect of "this looks like the man." Although he subsequently chose two other pictures as possibilities, Buckle was more positive about Ryder's picture. Buckle later made a tenantive identification of Ryder from an array of five photos presented to him by police officers, adding that he would have to see Ryder in person to be sure.

Ryder contends that Buckle's failure to make a positive identification prior to the lineup demonstrates that no independent source for the in-court identification existed. This argument ignores the limitation of photographic identifications: as defense counsel

himself brought out on cross-examination, at least part of Buckle's uncertainty resulted from the fact that he could not determine the defendant's height and weight from the pictures. While the witness' degree of certainty in making the photographic identification is relevant, the lack of certainty does not overcome the fact that Buckle in fact chose Ryder's picture at both opportunities he had to make the identification.

It is true that Buckle tentatively selected two other possible suspects (of which he was less positive than Ryder) from the photo array presented to him by the fire department inspector. Although this fact is entitled to some weight, on balance we believe that Buckle's preline-

up identifications of Ryder indicate that he would have been able to identify Ryder in court even if no lineup had been held.

Buckle saw only one photo array of possible black suspects, and there is some dispute whether he was able to identify Curtis' picture. Buckle testified that he told the police that the picture of Curtis "resembled" the robber. However, an officer called at the suppression hearing stated that to the best of his recollection Buckle made no identification from the photographs and noted that the picture of Curtis was taken some four years before the robbery and was blurred. Buckle did not identify anyone else in the array. In light of the conflicting evidence and the defects of the photograph used, the prelineup identifi-

cation factors neither favor nor negate the independence of the in-court identification in Curtis' case.

The final Wade factor, upon which the defendants principally rely, is the lapse of time between the incident and the lineup. In this case, the lineup was held 19 months after the robbery; clearly the delay here is a "seriously negative factor" (Neil v. Biggers (1972), 409 U.S. 188, 201, 93 S.Ct. 375, 383, 34 L.Ed.2d 401 (412). However, we do not think it is a dispositive one, especially considering the excellent opportunity which Buckle had to observe the crime and the accuracy of his descriptions of the suspects. Defendants in effect urge us to announce a rule that an in-court identification can never be independent of a

lineup which occurs a significant time after the event. Our experience rejects such a rule. We conclude that a balancing of the Wade factors demonstrates that Buckle's in-court identifications were based on his observations at the time of the robbery, not what he saw at the lineups. Thus, his in-court identifications of both defendants were admissible.

IV. HARMLESS-ERROR INQUIRY

We have concluded that none of the evidence adduced against Ryder at trial resulted from or was tainted by the uncounseled lineup identification. Any error in permitting the lineup to be held in the absence of his lawyer was therefore harmless beyond a reasonable doubt, and his conviction must be affirmed.

(See Chapman v. California (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.) With respect to Curtis a more detailed inquiry is required since, assuming that a sixth amendment violation occurred, the court improperly allowed Buckle to testify that he identified Curtis at the lineup.

Excluding the lineup testimony, the principal evidence against Curtis consisted of the remaining identifications--Harris' identification from the lineup photograph and both witnesses' in-court identifications--and Kinnie's testimony that he, Curtis and Ryder executed the robbery. The in-court identifications of both witnesses were positive, and the record demonstrates that both witnesses had a sufficient opportunity to observe

Curtis during the robbery. Several days before identifying Curtis from the lineup photograph, Harris saw a newspaper story concerning the robbery. The story included pictures of the defendants, but no claim has been made that the identification from the lineup photograph was thereby rendered impermissibly suggestive, and that identification was properly considered.

Kinnie testified that he had known Ryder for at least 10 years and Curtis for about six. On Ryder's initiative, Kinnie and Ryder discussed robbing the liquor store in early July 1979. Sometime thereafter Kinnie and Ryder had a phone conversation in which Ryder advised Kinnie that Curtis would be involved in the robbery. On July 18, the day of the

robbery, Ryder called Kinnie at the liquor store to inform Kinnie that he was coming over than day. At four o'clock ryder entered the store, made a small purchase, and left. Kinnie followed him to the parking lot, and Ryder told him that it looked all right that he would talk to Curtis. Several hours later Curtis appeared at the store, also bought something, and spoke with Kinnie in the parking lot. Apparently the only advance planning among the three was the defendants would take Kinnie's gun and that the robbery would take place at closing time. The robbery occurred at approximately 10 p.m., and Kinnie's version of the incident was consistent in all relevant details with those given by Buckle and Harris. After talking with the po-

lice who came to investigate the robbery, Kinnie went directly to Curtis' house, where he split the money with the defendants. The record reflects that Kinnie's testimony as to Curtis' address was accurate.

Of course, both Kinnie's integrity and his motive in testifying were open to question. Kinnie, already on Federal probation for a felony at the time of trial, testified in exchange for an agreement with the State on the armed-robbery charge as well as several other outstanding charges. He admitted to committing deceptive practices. Also, at the time Kinnie confessed to the police in February 1981, he knew that the fire department's internal affairs division, including Ryder, was investigating him

for stealing the money from dead persons in ambulances while working as an emergency medical technician. However, Kinnie's credibility need not be judged in a vacuum; his statements and the eyewitness accounts and identifications were mutually corroborative. In addition, Kinnie's testimony explains the peculiar fact mentioned by both witnesses that his gun was returned to him after Ryder removed the shells. Kinnie's story also explains why he was separated from the other employees while the robbery was in progress.

In its harmless-error analysis, the appellate court noted that the State never called Greg Webb, who was the other witness to the robbery. His absence is not relevant since there is nothing to show that the defendants could not have

called Webb had they desired to do so.

This is not a case in which the prosecution has repeatedly emphasized an improper lineup identification rendering that evidence "pivotal" to the conviction. (Cf. Frisco v. Blackburn (5th Cir.1986), 782 F.2d 1353, 1356.) That identification was only mentioned once during Buckle's direct examination and not at all in closing argument. Considering the other evidence against Curtis, it is clear beyond a reasonable doubt that he would have been convicted even absent the admission of Buckle's lineup identification. We are therefore persuaded that any error was harmless.

The judgment of the appellate court is reversed, and the convictions of both defendants are affirmed.

Appellate court reversed; circuit court affirmed.

Justice GOLDENHERSH, dissenting:

I dissent. I agree with the majority opinion of the appellate court and would remand the cause for a new trial.

The majority concedes that the suppression of Buckle's lineup identification of Ryder was proper and disposes of the question whether Buckle's lineup identification of Curtis should also have been suppressed by holding that the error, if any, was harmless. It condones the use of a photograph of the lineup, admittedly unconstitutional (Kirby v. Illinois (1972), 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411), as the basis of the identification of defendants by the witness Harris. No reason is

shown for Harris' failure to attend one of the lineups or why another could not have been arranged. Concerning the use of photographs under these circumstances, this court said in People v. Kubat (1983), 94 Ill.2d 437, 69 Ill.Dec. 30, 44 N.E.2d 247:

> "There is, of course, no constitutional impediment to the use of photographs in the initial identification, despite the recognition that there is a risk of misidentification when the procedures are improperly employed. (Simmons v. United States (1968), 390 U.S. 377, 385-86, 19 L.Ed.2d 1247, 1254, 88 S.Ct. 967, 972.) When properly used, this technique is indispensable in the investigatory prase of a criminal case.' (People v. Jackson (1973), 54 Ill.2d 143, 147 [296 N.E.2d 462].) When a suspect is in custody, however, and a lineup is otherwise feasible, this court has generally disapproved of the use of photographs as a basis of identification, absent extenuating circumstances justifying their

> use. People v. Williams (1975), 60 Ill.2d 1, 9 [322 N.E.2d 819]; People v. Jackson (1973) 54 Ill.2d 143, 147-48 [295 N.E.2d 462]; People v. Holiday (1970), 47 Ill.2d 300, 306-07 [265 N.E.2d 634]" 94 Ill.2d 437, 471, 69 Ill.Dec. 30, 447 N.E.2d 247.

There are no "extenuating circumstances" shown here, and there is no justification for the use of the photograph in making the identi-fication.

The majority recognizes that an in-court identification which follows an uncounseled lineup may not be admitted unless the State can establish by clear and convincing evidence that the in-court identification was based upon observations of the suspect other than the line-up identification. In my opinion the People failed to adduce such clear and convincing evidence. Buckle was hesitant

in making the identification, and it was only after an examination of photos and the lineup that he did so. Furthermore, defendant Ryder was the only man in the lineup whose photograph was among those submitted to Buckle before the lineup. So far as can be determined by the record, the only photo of a participant in the lineup included in the photos shown Harris was that of Curtis. The suggestive effect of including the photo of only one participant in the lineup in the array shown the witness is obvious.

The appellate court noted:

> "[T]he prosecutor opportunistically elicited testimony from Buckle that he had identified defendants at the lineups, which were held in violation of defendants' constitutional rights. Moreover, the prosector showed Harris the lineup photographs at trial and elicited testimony from Harris

> that she had seen the lineup photographs on February 23, 1981, and identified defendants at the time from the lineup photographs. The lineup photographs were then admitted into evidence. Plainly, the testimony and evidence were the direct results of the unconstitutional lineups, obtained by the prosecutor's exploitation of the primary illegality." (132 Ill.App.3d 241, 252, 87 Ill.Dec. 170, 476 N.E.-2d 1162.)

Defendants did not receive a fair trial, and the cause should be remanded in accordance with the judgment of the appellate court.

The PEOPLE of the State of Illinois,

Plaintiff-Appellee,

v.

James CURTIS and Andrew Ryder,

Defendants-Appellants.

Nos. 83-2339, 83-2395.

Appellate Court of Illinois,

First District, Third Division.

March 29, 1985.

James L. Hardemon, Wilson Frost, Chicago, for defendant-appellant Curtis.

Patrick A. Tuite, Chicago, for defendant-appellant Ryder.

Richard M. Daley, State's Atty., Chicago, for plaintiff-appellee.

RIZZI, Justice.

Defendants James Curtis and Andrew Ryder were found guilty of armed robbery in a bench trial. We reverse the convic-

tions and remand for a new trial because of the violation of defendants' sixth amendment right to counsel after adversarial judicial proceedings had been initiated against them and because of the exploitation of the results of that constitutional violation at trial.

On July 18, 1979, two men entered a liquor store at about 10 p.m., near closing time. They pretended to be customers and then wielded guns and removed a gun from a part-time security guard, Fred Kennie. They also took money and checks from the store manager, Thomas Buckle, a cashier, Rosalind Harris, and another employee, Gregory Webb. The entire incident lasted from 15 minutes to a half hour. After the robbery, the police were called and Buckle related that the rob-

bers were a white man and a black man. Buckle also gave a general description of the robbers to the police.

Nineteen months later, in early February of 1981, Kennie informed the police that he was a participant in the robbery and that his accomplices were defendants Ryder and Curtis. On February 10, 1981, two arrays of five photographs were shown to Buckle. One array included a photograph of Ryder, and the other array included a photograph of Curtis. According to the testimony of a police officer, Buckle made a tentative identification of Ryder from the first array. The same police officer testified, however, that Buckle was not sure and that, in effect, he wanted to see the man in the photograph in person before he made a

positive identification. After looking at the second array of five photographs Buckle said "this one here resembled" Curtis.

On February 11, 1981, an array of five photographs, which included a photograph of Ryder, was shown to Harris. She stated that the photograph of Ryder "looked like the guy" she saw in the store. After being shown another array of five photographs, which included a photograph of Curtis, she stated, "I thought this was the picture of the black guy."

On February 17, 1981, felony complaints were prepared and submitted before a judge of the circuit court, naming Ryder and Curtis as defendants. The complaints charged defendants with armed

robbery. After conducting a hearing, the judge determined that there was probable cause for filing the complaints. He gave the assistant State's Attorney leave to file the complaints, and he issued arrest warrants.

At about 5 p.m. on the same day, Ryder was arrested pursuant to the warrant and taken to the area police station. He requested an attorney and declined to give a statement until he talked to his attorney. He telephoned his attorney, and he was told not to give any statements. Also Ryder's attorney testified that he told a police officer on the telephone that he was in the process of working on another matter, but that he would appear at the police station and represent Ryder and he would

attend a proposed lineup involving Ryder. About an hour and 15 minutes later, around 8:30 p.m., before the attorney arrived at the police station and without a waiver from Ryder, a lineup which included Ryder was conducted at the police station. Ryder's attorney appeared at the police station at 11 p.m., but the lineup had already taken place.

At the lineup, Buckle identified Ryder as one of the robbers. Ryder was the only person in the lineup who was in the array of five photographs that had been shown to Buckle seven days earlier on February 10, 1981.

Curtis was also arrested on February 17, 1981. After his arrest, he was taken to the same area police station but he did not arrive there until about 6:45

p.m. At the police station, when he was read his Miranda warnings and asked if he wanted to give a statement, he said: "I told them no until I see my attorney." When he was asked if he wanted to call an attorney, he said: "I told them I had three attorneys and didn't know which one to call at that time of night, whether they'd be in the office or not." Later, he attempted to call two of the lawyers but he was not able to reach them because no one answered the phone calls. About one-half hour to one hour later, Curtis was taken to a room where he was told "[Y]ou're going to have to be in a lineup and * * * to stand where I wanted to." Curtis did not voluntarily participate in the lineup. He was told he "had to stand the lineup."

At the lineup, Buckle told the police that Curtis "resembled the man." At no time did Curtis tell anyone that he did not want an attorney or that he waived his right to an attorney. An assistant State's Attorney was present during the lineup involving Curtis, as well as during the lineup involving Ryder.

The police officer who arrested Curtis testified that after he read Curtis the Miranda warnings in an interview room at the police station, the following occurred:

> A I told him there is going to be a lineup in or about an hour or two and that there'd be several people viewing the lineup and he had the right to contact an attorney.
>
> Q What did he say to that?
>
> A He stated he had three attorneys and didn't know which one he wanted to call, and I

offered him the phone to call all three if he wished.

Q What did he say to that?

A He stated he wanted to wait and see what happened. Meaning, I assume, he meant after the lineup. I don't know.

Q Okay. So did he make any calls at that time?

A He did make some phone calls.

Q Do you know who to?

A No.

Q Did he tell you anything after that?

A No.

Q Okay. By the way, he did indicate whether he wanted to give any statement when you advised him of his Miranda warnings?

A Right after he was advised of his rights he declined to give any statement at all.

Curtis was then taken to another

room. While he was in that room, a second police officer stepped inside the room and began conversing with Curtis. As to what occurred, the police officer testified:

> Q What, if anything, did he say to you, what, if anything did you say to him?
>
> A I believe, first, I remarked about not looking like his picture. And, I told him who I was. And, I was working on the case. And, I asked him if he had been advised of his rights.
> He said he had. And, he had already been advised of his rights. And, I told him that Mr. Ryder had been arrested. And also that Mr. [Kennie] had been arrested in this matter. And that he would have to stand a line-up. And, I asked him if he had an Attorney. And, advised him that Mr. Ryder had an Attorney. And he said that he had three Attorneys.
>
> Now, on the three Attorneys he had, he used them, apparently, in some business deals or what have you, before. But, he in-

formed me that he did not want to make a phone call. And, did not want to talk to one of the Attorneys, because--as he said--he was "gonna play it by ear" at that time. And, he didn't know who he was going to use as an Attorney. Because he had three of them that he had dealt with in the past.

Q. So, did he make any phone calls, at all, in your presence?

A He made no phone calls. At that time, I asked him did he want one and he did not.

On February 19, 1981, Harris, who had not attended the lineups, saw a picture of Ryder and Curtis in a newspaper which reported that they had been arrested for the robbery. On February 23, 1981, police officers visited Harris and showed her photographs of the lineups that had been taken on February 17, 1981. She viewed the lineup photographs and stated that Curtis and Ryder were the

"guys that [were] at the store."

The trial took place more than four years after the robbery. Except as stated, neither Buckle nor Harris had seen or viewed defendants in the interim period. At trial, defendants filed motions to suppress the lineup identifications that had been made by Buckle. The court allowed the motion to suppress as to Ryder on the basis that the lineup identification had occurred without assistance of counsel in violation of the sixth amendment. However, the court denied the motion to suppress as to Curtis on the basis that he had waived his right to assistance of counsel at the lineup.

At trial, over the objections of defendants, the court allowed Buckle and

Harris to make in-court identifications of defendants. Defendants objected on the basis that the in-court identifications were the result of the unconstitutionally obtained lineup identifications and that, therefore, they should have been suppressed. In addition, over the objections of defendants, the prosecutor showed Harris the lineup photographs at trial, and Harris testified that she had seen the lineup photographs on February 23, 1981, and that she had identified defendants at that time. The lineup photographs were then admitted into evidence.

A critical issue in this case involves an accused's sixth amendment right "to have the Assistance of Counsel for his defence." U.S.Const., amend. VI.

Specifically, defendants argue that their constitutional right to counsel at the lineups was violated and, therefore, the lineup evidence and the in-court identifications of defendants at trial should have been suppressed. The State counters that the lineup evidence and the in-court identifications were proper "as no right to counsel had attached at the time of the lineup[s] since no adversarial [judicial] proceedings had been initiated."[1]

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[1] This case involves defendants' sixth amendment right to counsel and not their fifth amendment right to counsel. One's fifth amendment right to counsel comes into existence during custodial interrogation. Its purpose is to protect a citizen from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature. Here, neither the lineups nor anything that defendants were required to do in the lineups violated their privilege against self-incrimination. See United States v. Wade (1967), 388 U.S. 218, 221-27, 87 S.Ct. 1926,

In addressing the issue, we first observe what the United States Supreme Court said in Gilbert v. California: "We there held [in United States v. Wade (1967), 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149], that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup." 388 U.S. 263, 272, 87 S.Ct.

1929-32, 18 L.Ed.2d 1149, 1154-58; People v. Martin (1984), 102 Ill.2d 412, 419, 80 Ill.Dec. 776, 783, 466 N.E.2d 228, 231.

1951, 1956, 18 L.Ed.2d 1178, 1186 (1967).

Subsequent to the Gilbert decision, the United States Supreme Court decided Kirby v. Illinois (1972), 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411. In Kirby, the Court held that an accused's sixth amendment right to counsel attaches at or after the time that adversarial judicial proceedings have been initiated against him "by way of formal charge, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois, 406 U.S. at 689, 92 S.Ct. at 1882, 32 L.Ed.2d at 417, quoted in Moore v. Illinois (1977), 434 U.S. 220, 226, 98 S.Ct. 458, 464, 54 L.Ed.2d 424, 432. See also United States v. Gouveia (1984), ___ U.S. ___, ___, 104 S.Ct. 2292, 2297, 81 L.Ed.2d 146, 153; People v. Martin (1984), 102 Ill.2d 412,

419, 80 Ill.Dec. 776, 783, 466 N.E.2d 228, 231.

With this background, we focus on the question of whether at the time of the lineups in the present case, adversarial judicial proceedings had already been initiated against defendants "by way of formal charge." We believe that the answer lies in an examination of the standard criminal procedures that are followed in Illinois and which are followed in this case.

Prosecutions are commenced by a complaint, an information, or an indictment. Ill.Rev.Stat. 1983, ch. 38, par. 111-1. When an arrest warrant is sought in a felony case, a felony complaint is presented by an assistant State's Attorney to a judge in the circuit court. In ad-

dition to naming the State as the plaintiff, the felony complaint names the accused as a defendant and charges that he has committed a specified felony offense. The judge must examine under oath the complainant and any witnesses presented by the assistant State's Attorney. If it appears to the judge, from his examination of the complainant and witnesses presented by the assistant State's Attorney and the contents of the complaint, that the person charged committed an offense, the judge will approve the filing of the complaint naming the person charged as the defendant, and the judge will issue a warrant for the defendant's arrest.[2] Ill.Rev.Stat.1983, ch. 38, par.

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[2] In the present case, the judge subscribed to the following statement on the face of the felony complaints: "I

107-9.

Plainly, after the complaint is filed, the person charged has ceased being merely an accused, and he has, in fact, in every respect become a formal defendant in need of an attorney to protect his interests as a citizen at any subsequent critical stage of the criminal proceedings that are brought against him by the State. Here, we must also bear in mind that it is after this stage that the defendant may file motions to suppress or to quash the formal charges that are made

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have examined the above complaint and the person presenting the same and have heard evidence thereon, and am satisfied that there is probable cause for filing same. Leave is given to file said complaint."

against him in the complaint.[3] Also, we note that "a complaint" is expressly included in the Code of Criminal Procedure under sections entitled "Form of charge" (Ill.Rev.Stat. 1983, ch. 38, par. 111-3), and "Formal defects in a charge" (Ill. Rev.Stat. 1983, ch. 38, par. 111-5). Thus, it would be incongruous to conclude that after a felony complaint is judicially approved and filed in the circuit court, adversarial judicial proceedings have not been commenced against a defendant "by way of formal charge." See Moore v. Illinois, 434 U.S. at 226, 98

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[3] The felony complaint that is filed in court after a judicial hearing and approval also serves as the basis for the preliminary hearing upon which the State's Attorney signs and files an information if there is probable cause. Ill.Rev.Stat.1983, ch. 38, pars. 109-3, 111-3.

S.Ct. at 464, 54 L.Ed.2d at 432, quoting Kirby v. Illinois, 406 U.S. at 689, 92 S.Ct. at 1882, 32 L.Ed.2d at 417.

Accordingly, we believe that adversarial judicial proceedings by way of formal charge in felony cases commence after the filing of a felony complaint in the circuit court.[4] If it were otherwise, the use of the pertinent term "formal charge" in Kirby to designate when adversarial judicial proceedings have been initiated would be meaningless, for the term would not be distinguished from "preliminary hearing, indictment, information, or arraignment." Moore v. Illinois, 434 U.S. at 226, 98 S.Ct. at 464, 54 L.Ed.2d at 432, quoting Kirby v. Illinois, 406 U.S. at 689, 92 S.Ct. at 1882, 32 L.Ed.2d at 417.

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[4] But see People v. Boswell (1985), 132 Ill.App.3d 52, 87 Ill.Dec. 162, 476 N.E.2d 1154.

Under the circumstances, since we believe that adversarial judicial proceedings had already been initiated against defendants before the lineups took place, we conclude that their sixth amendment right to assistance of counsel had already attached at the time of the lineups. This being so, defendants had a constitutional entitlement to the presence of counsel at the lineups because it is firmly established that a lineup is a critical stage of the criminal proceedings against a defendant. United States v. Wade (1967), 388 U.S. at 227-37, 87 S.Ct. 1932-38, 18 L.Ed.2d at 1157-63; Gilbert v. California, 388 U.S. at 272, 87 S.Ct. at 1956, 18 L.Ed.2d at 1186; Moore v. Illinois, 434 U.S. at 229-32, 98 S.Ct. at 465-66, 54 L.Ed.2d at 434-36.

As to Ryder, he was placed in a lineup without having counsel present to protect his interests at the lineup. Thus, the trial court properly suppressed the pretrial lineup identification of him that was made by Buckle.

As to Curtis, the trial court ruled that he waived his constitutional right to assistance of counsel at the lineup. We disagree. A waiver is an intentional abandonment of a known right. Johnson v. Zerbst (1938), 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466; People v. Swift (1980), 91 Ill.App.3d 361, 364, 414 N.E.2d 895, 898. This precept must be applied here with utmost scrutiny for fundamental constitutional rights, such as the right to assistance of counsel, were paid for too dearly to

be lost unwittingly by any citizen. Thus, before we can conclude that Curtis intelligently waived his constitutional right to assistance of counsel at the lineup, we must determine whether he knew of the existence of that right in a very real sense. Accordingly, we must determine whether he knew under the circumstances in which he found himself that the police could not demand that he appear at the lineup without assistance of counsel.

The circumstances under which Curtis found himself are not common to the average citizen.[5] He was under arrest and at

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[5] The record reflects that Curtis had no previous convictions, and the transcript of the sentencing hearing suggests that he has steady employment, strong familial ties and no history of serious criminality. In sentencing Curtis, the trial judge imposed the statu-

a police station between the hours of 7 and 8 p.m. When he was given Miranda warnings, he responded by saying that he did not want to give a statement until "I see my attorney." A police officer testified that after Curtis was advised of his rights, "he declined to give any statement at all." Curtis had three lawyers who had represented him in business matters in the past, but he did not know which one to call at that time of night because they probably would not be in their offices. The police officer told Curtis that he was going to have to

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tory minimum sentence of six years. In Johnson v. Zerbst, 304 U.S. at 464, 58 S.Ct. at 1023, 82 L.Ed. at 1466, the Court held that "the background, experience, and conduct of the accused" in each case is to be taken into consideration in determining "whether there has been an intelligent waiver of the right to counsel."

be part of a lineup and that "he had the right to contact an attorney." The police officer stated that when he offered Curtis the phone to call his attorneys, Curtis said that he wanted to wait and see what happened. Curtis then called two of the lawyers that had represented him in the past, but no one answered the phone calls. Later, Curtis was taken to another interview room, where a second police officer told him "that he would have to stand a line-up." It is unrebutted that all of this happened after Curtis had unequivocally told the police that he did not want to give any statement until he saw his lawyer.[6] The sec-

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[6] Knowledge of Curtis' previous statement to the police that he did not want to give any statement until he saw his lawyer is imputed to the second police officer. See People v. Hammock

ond police officer then asked Curtis if he had an attorney, and Curtis told him that he had three attorneys, but did not know which one he was going to use and he would "play it by ear" at that time. This response by Curtis was made after he had already phoned two attorneys but was not able to reach them because it was nighttime, and they were not in their offices.

In its argument to establish a waiver of counsel, the State relies upon the first police officer's statement that when he offered Curtis the phone to call his attorneys, Curtis said that he wanted to wait and see. The State also relies

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(1984), 121 Ill.App.3d 874, 881 n. 4, 77 Ill.Dec. 322, 329 n.4, 460 N.E.2d 378, 383 n.4, citing People v. White (1975), 61 Ill.2d 288, 294, 335 N.E.2d 457, 461.

upon the second police officer's statement that Curtis said he was "gonna play it by ear." However, the crucible for determining whether there was a waiver of one's constitutional right to counsel is plainly not solely the words attributed to a defendant by a police officer. See People v. Dailey (1972), 51 Ill.2d 239, 241, 282 N.E.2d 129, 130. Here, Curtis' words were not uttered in a vacuum, and we should not view them in that manner. Rather, we must look to the facts and circumstances surrounding his words to determine whether he uttered them as an intentional abandonment of a constitutional right that was known to him.

In this regard, since the right to assistance of counsel is a fundamental constitutional right, we must indulge in

every reasonable presumption that Curtis did not waive the right, and we cannot presume acquiescence in the loss of the right.[7] Johnson v. Zerbst, 304 U.S. at

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[7] On this point, we note with interest that three justices presently sitting on the United States Supreme Court support the position that only an express and specific waiver of the right to counsel will justify a loss of the constitutional right. North Carolina v. Butler (1949), 441 U.S. 369, 377-79, 99 S.Ct. 1755, 1759-60, 60 L.Ed.2d 286, 294-96 (Brennan, J., dissenting, joined by Marshall and Stevens, JJ.). In his dissent, Justice Brennan states: "[T]he requirement of an express waiver would impose no burden on the police not imposed by the Court's interpretation. It would merely make that burden explicit. Had Agent Martinez simply elicited a clear answer from Willie Butler to the question, 'Do you waive your right to a lawyer?' this journey through three courts would not have been necessary." 441 U.S. at 379, 99 S.Ct. at 1760, 60 L.Ed.2d at 296. But see People v. Martin (1984), 102 Ill.2d 412, 425, 80 Ill.Dec. 776, 789, 466 N.E.2d 228, 234: "This court has held that a valid relinquishment of the right to counsel is not dependent on an express waiver."

464, 58 S.Ct. at 1023, 82 L.Ed. at 1466. Moreover, although the trial court need not be convinced beyond a reasonable doubt when considering the issue of waiver, we must bear in mind that the State has the burden of proof on the issue. People v. Swift (1980), 91 Ill.App. 3d 361, 364, 46 Ill.Dec. 842, 845, 414 N.E.-2d 895, 898. The State's burden to establish a waiver of the right to counsel has been described as a "heavy burden." People v. Taylor (1979), 76 Ill.2d 289, 310-11, 29 Ill.Dec. 103, 124-25, 391 N.E.2d 366, 375-76.

In the present case, we believe the facts plainly manifest that under the circumstances in which he found himself, Curtis did not know that the police could not demand that he appear at the lineup

without assistance of counsel. Rather, it was made to appear as if his participation in the lineup that night, with or without counsel, was inevitable. We also believe that the facts and circumstances surrounding Curtis' answers to the police officers strongly militate against the conclusion that Curtis intentionally abandoned a constitutional right that was known to him. Cf. Johnson v. Zerbst (1938), 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; People v. Swift (1980), 91 Ill.App.3d 361, 46 Ill.Dec. 842, 414 N.E.2d 895; People v. Taylor (1979), 76 Ill.2d 289, 29 Ill.Dec. 103, 391 N.E.2d 366.[8] Thus, applying the waiver prin-

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[8] The Johnson and Swift cases involve a claim of waiver of one's right to counsel under the sixth amendment. There is authority to support the position that there is a higher standard that must be

ciples to the facts before us, we conclude that the trial court's ruling that Curtis waived his constitutional right to counsel at the lineup is against the manifest weight of the evidence. See People v. Martin (1984), 102 Ill.2d 412, 426, 80 Ill.Dec. 776, 782, 466 N.E.2d 228, 234.

In addition, before the conversations on which the State relies to establish a waiver took place, Curtis had already told the police that he did not want to give any statements until he saw

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met to show a waiver of one's sixth amendment right to counsel than to counsel. Wyrick v. Fields (1982), 459 U.S. 42, 52-55, 103 S.Ct. 394, 398-400, 74 L.Ed.2d 214, 221-24 (Marshall, J., dissenting). However, there is also authority to support the position that the standard that must be met to show a waiver of one's right to counsel is the same under the fifth and sixth amendments. See People v. Owens (1984), 102 Ill.2d 88, 102, 79 Ill.Dec. 663, 669, 464 N.E.2d 261, 267.

his lawyer. In our view, once Curtis asserted his right to counsel, the police were obligated not to initiate any conversation with him concerning a critical stage of the criminal proceedings against him until he had a reasonable time to make contact with his counsel, or at the very least, until he was furnished with substitute counsel. See United States v. Wade, 388 U.S. at 237, 87 S.Ct. at 1937-38, 18 L.Ed.2d at 1163. Instead, after Curtis had asserted his right to counsel, the police readied him for the lineups and initiated the conversations with him on which the State relies to establish a waiver of assistance of counsel. We believe that the conversations were improperly initiated by the police. By way of comparison, in a fifth amendment right

to counsel setting, the United States Supreme Court held that once a suspect in custody asserts his right to counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona (1981), 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85, 68 L.Ed.2d 378, 386-87; see also Smith v. Illinois (1984), ___ U.S. ___, 105 S.Ct. 490, 83 L.Ed.2d 488. If the authorities initiate further communications, exchanges, or conversations with the defendant, any information or waiver resulting therefrom would be unconstitutionally obtained. People v. Hammock (1984), 121 Ill.App.3d 874, 879-80, 77

Ill.Dec. 322, 326, 460 N.E.2d 378, 382. We see no reason why the pertinent rationale and holdings in Edwards and Smith should not apply in a sixth amendment right to assistance of counsel setting in regard to communications, exchanges, or conduct involving a critical stage of the criminal proceedings against the defendant. Rights and guarantees afforded by the Bill of Rights cannot be made the subject of an endurance test. See People v. Smith (1984), 102 Ill.2d 365, 378, 80 Ill.Dec. 784, 790, 466 N.E.2d 236, 242 (Simon, J., dissenting) majority rev'd sub nom. Smith v. Illinois (1984), ___ U.S. ___, 105 S.Ct. 490, 83 L.Ed.2d 488; People v. Hammock, 121 Ill.App.3d at 879-80, 77 Ill.Dec. 326-27, 460 N.E.2d at 382-83. This fact can be stated judi-

cially without reservation for it is plainly ingrained in our American ideals.

Accordingly, not only do we conclude that the trial court's ruling that Curtis waived his constitutional right to assistance of counsel at the lineup is against the manifest weight of the evidence, but we also conclude that under the circumstances any waiver of that right would have been unconstitutionally obtained. Cf. Edwards v. Arizona, 451 U.S. at 484-85, 101 S.Ct. at 1884-85, 68 L.Ed.2d at 386-87; People v. Hammock, 121 Ill.App.3d at 879-80, 77 Ill. Dec. 326-27, 460 N.E.-2d at 382-83.

Next, the State, relying upon Wade, takes that position that even if defendants' constitutional right to counsel was violated at the lineup and there was

no waiver, no error occurred at trial because there was an independent basis for the in-court identifications made by Buckle and Harris. In Wade, the Court held that if the prosecution established by clear and convincing evidence that the in-court identification is based upon observations of the suspect other than from the lineup identification, then the in-court identification is permissible. United States v. Wade, 388 U.S. at 239-42, 87 S.Ct. 1939-40, 18 L.Ed.2d at 1164-66. However, in Wade, unlike the present case, the prosecution did not elicit from the witnesses the fact that they had identified the defendant at the lineup, and there was no evidence of the lineup itself introduced at trial. See Moore v. Illinois, 434 U.S. at 225-26, 98 S.Ct. at

463, 54 L.Ed.2d at 431-32.

Here, the prosecutor opportunistically elicited testimony from Buckle that he had identified defendants at the lineups, which were held in violation of defendants' constitutional rights. Moreover, the prosecutor showed Harris the lineup photographs at trial and elicited testimony from Harris that she had seen the lineup photographs on February 23, 1981, and identified defendants at that time from the lineup photographs. The lineup photographs were then admitted into evidence. Plainly, this testimony and evidence were the direct results of the unconstitutional lineups, obtained by the prosecutor's exploitation of the primary illegality. The testimony and evidence should therefore have been pro-

hibited without regard to whether the prosecution was able to prove that the pretrial identifications or the in-court identifications had an independent source.

Moreover, only a per se exclusionary rule as to such testimony and evidence can be an efficacious sanction to assure that law enforcement authorities will respect an accused's constitutional right to assistance of counsel at all critical stages after adversarial judicial proceedings have been commenced against him. Moore v. Illinois, 434 U.S. at 231-32, 98 S.Ct. at 466, 54 L.Ed.2d at 435-36; Gilbert v. California, 388 U.S. at 272-74, 87 S.Ct. at 1956-57, 18 L.Ed.2d at 1186-87. Thus, in the present case, the State was not entitled to show that the tes-

timony and other evidence of the pretrial identifications, or the in-court identifications had an independent source.

Under the circumstances, a question arises as to whether we are able to declare a belief that the violation of defendants' sixth amendment right to assistance of counsel was harmless beyond a reasonable doubt. Chapman v. California (1967), 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-11; Moore v. Illinois, 434 U.S. at 232, 98 S.Ct. at 466, 54 L.Ed.2d at 436; Gilbert v. California, 388 U.S. at 274, 87 S.Ct. at 1957, 18 L.Ed.2d at 1187. We conclude that we cannot make such a declaration.

In this regard, we first observe that Webb, who was present throughout the robbery and presumably could have made an

identification of the robbers, was not called as a witness by the State. In addition, while Webb witnessed lineups which included defendants right after the lineup witnessed by Buckle on the night of February 18, 1981, the record is silent as to whether Webb identified either of the defendants at those lineups. Here, we note that although an assistant State's Attorney was present at the lineups, defendants did not have counsel present to observe or perhaps memorialize Webb's responses or reactions at the lineups.

Since the State did not call Webb as a witness, the only witness to identify defendants besides Buckle and Harris was Kennie. However, while Kennie's testimony may be true, it is subject to rea-

sonable doubt. In February 1981, 19 months after the robbery, Kennie first named defendants as the robbers. At the time, in addition to his part-time security job at the liquor store, he was working full-time for the Chicago Fire Department as an emergency medical technician. He had worked for the Chicago Fire Department for 10 or 12 years. Kennie testified that in February 1981, Ryder was a captain in the Chicago Fire Department assigned to the Internal Affairs Division. Kennie also testified that in February 1981, he knew that Ryder and the IAD were investigating him for stealing money from dead people and sick people in fire department ambulances. Kennie testified that he knew that if the charges against him which Ryder was in-

vestigating at the time were proved, then he would lose his job with the Chicago Fire Department.

There are other aspects of Kennie's testimony that are worth noting. According to Kennie's own testimony, he had "an agreement with the People of the State of Illinois" relative to his testimony at trial. The agreement was that the State would recommend that he receive minimum concurrent sentences for an armed robbery charge and a forgery charge then pending against him. In addition, Kennie had a possession of controlled substance charge pending, which, under Kennie's agreement with the State in the present case, the State would nolle pros or dismiss. Kennie's agreement with the State in the present case also included a disposition

of two counts of deceptive practice charges pending against him for cashing worthless checks.

We believe that Kennie's agreements with the State relative to his testimony at trial, his history of criminality and the circumstances under which his "cooperation" with the State arose seriously impugn his testimony and subject to it reasonable doubt.[9] Thus, in reality, this case may have hinged on the weight

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[9] Compare People v. Smith (1982), 93 Ill.2d 179, 190, 66 Ill.Dec. 412, 417, 442 N.E.2d 1325, 1330, where the court stated: "Finally, the State argues that even if the statements should not have been admitted, admitting them was harmless error. Considering the record we cannot agree. * * * Moreover, as the defendant points out, the only other evidence directly linking the defendant to the crimes was the testimony of Mary Smith, who pleaded guilty to armed robbery, and whose murder charges were dropped in exchange for her testimony."

that was given to the identifications that were made by Buckle and Harris. As to these two witnesses, not only did the prosecutor expediently buttress their in-court identifications with the unlawful lineup identifications and the pretrial identifications that had been made with the use of the lineup photographs, but he also put into evidence the unlawful line-up photographs themselves. The prosecutor's wrongful enhancement of the identifications made by Buckle and Harris is clearly significant because (1) neither Buckle nor Harris had ever seen defendants before the robbery, (2) more than 19 months had elapsed from the time of the robbery until Buckle and Harris first saw photographs of defendants, (3) Buckle's and Harris' initial identifications

from the photographs were not absolutely certain according to the police officer, (4) Harris had seen photographs of defendants in a newspaper account of defendants' arrest for the robbery only four days before she identified defendants in the lineup photographs, and (5) except for the unlawful lineup identifications by Buckle 19 months after the robbery, neither Buckle nor Harris had seen defendants in person for more than four years, from the time of the robbery until the trial.

We conclude that for all of the reasons that we have stated, we cannot declare a belief that the violation of defendants' sixth amendment right to assistance of counsel at the lineups and the exploitation of that violation by the

prosecutor were harmless beyond a reasonable doubt. Therefore, the convictions must be reversed.

One other issue is raised by defendants. They contend that the State failed in its burden to prove that the robbers were armed with dangerous weapons as required by the armed robbery statute. We find this contention to be totally without merit, and it does not warrant any discussion.

Accordingly, we reverse the convictions and remand the case for a new trial because of the violation of defendants' sixth amendment right to assistance of counsel after adversarial judicial proceedings had been initiated against them and because of the exploitation of the results of that constitutional violation

at trial.

REVERSED AND REMANDED.

McGILLICUDDY, J., concurs.

McNAMARA, J., dissents.

McNAMARA, Justice, dissenting.

I respectfully dissent from the majority's decision reversing defendants' convictions. The trial court correctly found that Curtis waived his constitutional right to counsel at the lineup and that the lineup and photographic identification procedures were not suggestive. There was also clear and convincing evidence presented to show that the in-court eyewitness identifications of both defendants were based on a source independent of the lineups. Accordingly, the trial court properly found that the testimony concerning the lineup iden-

tification of Curtis and the in-court identifications of both defendants was admissible at trial. I would affirm the convictions of both defendants.

An accused's sixth amendment right to counsel attaches at the commencement of adversarial judicial criminal proceedings. (Moore v. Illinois (1977), 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed.2d 424; People v. Burbank (1972), 53 Ill.2d 261, 291 N.E.2d 161, cert. denied (1973), 412 U.S. 951, 93 S.Ct. 3017, 37 L.Ed.2d 1004.) However, neither the United States Supreme Court nor our supreme court have decided whether sixth amendment rights attach upon the filing of a complaint and the issuance of an arrest warrant. Nevertheless, it is unnecessary to address this issue because the trial

court had ample proof to find that Curtis waived any right to counsel.

A waiver of counsel must be voluntary and must constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege. (Edwards v. Arizona (1981), 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378.) A determination of waiver depends "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (Johnson v. Zerbst (1938), 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461.) It is for the trial court to decide whether there has been a waiver of the right to counsel, the court need not be convinced beyond a reasonable doubt, and the court's decision will not be dis-

turbed unless it is against the manifest weight of the evidence. (People v. Dailey (1972), 51 Ill.2d 239, 282 N.E.2d 129.) Moreover, our supreme court has held that "a valid relinquishment of the right to counsel is not dependent upon an express waiver." People v. Martin (1984), 102 Ill.2d 412, 425, 80 Ill.Dec. 776, 466 N.E.2d 228, cert. denied, ___ U.S. ___, 105 S.Ct. 334, 83 L.Ed.2d 270.

Before being placed in the lineup Curtis was informed of his right to counsel at the lineup. The majority states that Curtis' statements as reported by the police officers that he wanted to "wait and see" before calling an attorney that he did not wish to call an attorney before the lineup because he was "gonna play it by ear" do not indicate a waiver.

Contrary to the majority's holding, the surrounding facts and circumstances and Curtis' background and conduct demonstrate that he knew he had a right to an attorney and waived that right.

When Curtis was initially advised of his right to counsel, the police testified that Curtis stated he had three lawyers, but did not want to call them. He had not made up his mind which attorney to call or if he was going to contact an attorney. After making two calls, Curtis stated that he would "play it by ear" and did not want to make a call or have an attorney present. He thereafter proceeded voluntarily to the lineup without an attorney. Although Curtis may have been unfamiliar with a station-house setting, he had a high school education

and had served in the military. He had contact with attorneys in the past and was advised that this was a serious case. Curtis chose to deal with the authorities on his own and to make his own legal decisions. (See Brewer v. Williams (1977), 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424.) Curtis' background and experience demonstrate that he understood his right to counsel and his language and conduct prior to the lineup show that he knowingly, intelligently and voluntarily waived this right.

The majority also asserts that, according to Edwards v. Arizona (1981), 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, any police-initiated conversation with Curtis after he asserted his right to counsel was improper and should not be

used as the basis for its finding. The United States Supreme Court has recently set forth its analysis of the fifth amendment right to counsel in Smith v. Illinois (1984), ___ U.S. ___, 105 S.Ct. 490, 83 L.Ed.2d 488. Two distinct inquiries are necessary in determining a fifth amendment constitutional violation: whether the accused invoked his right to counsel and if so, whether the accused initiated further conversation with police and thereafter knowingly and intelligently waived his right. The fallacy in extending the fifth amendment Edwards-Smith analysis to a sixth amendment lineup is that the right to counsel in each instance exists to protect different constitutional rights. The fifth amendment right to counsel attaches to protect an

accused from self-incrimination during custodial interrogation. (Edwards v. Arizona.) The sixth amendment right to counsel provides an attorney to assist an accused and insure fairness at the beginning of adversary judicial proceedings. (Kirby v. Illinois (1972), 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411.) While an accused can assert his fifth amendment right and halt questioning, an accused cannot halt a police investigation or judicial proceeding.

Therefore, applying the Edwards-Smith proscription that police cannot initiate further questioning once a lawyer has been requested to a sixth amendment lineup setting is illogical and improper. (See Rhode Island v. Innis (1980), 446 U.S. 291, 100 S.Ct. 1682, 64

L.Ed.2d 297.) It is entirely appropriate for police officers to again ask an accused if he wishes to call a lawyer or if he has contacted a lawyer, and if so, when the lawyer is expected to arrive. It would be impractical to prohibit any further inquiry concerning the request for a presence of an attorney at the anticipated lineup. The State should not have to wait until the accused initiates further conversation to determine if or when an attorney is coming. For sixth amendment lineup purposes, police officers should be able to make further inquiries concerning counsel without a constitutional violation.

Moreover, even if the Edwards-Smith rule did apply to a sixth amendment lineup setting, there is no clear and unequi-

vocal indication that Curtis requested an attorney's presence at the lineup. When advised of his right to counsel, Curtis responded equivocally. His statements and conduct showed indecisiveness and do not demonstrate a clear request for counsel. (See People v. Krueger (1980), 82 Ill.2d 305, 45 Ill.Dec. 186, 412 N.E.2d 537, cert. denied, (1981), 451 U.S. 1019, 101 S.Ct. 3009, 69 L.Ed.2d 390; People v. Winston (1982), 106 Ill.App.3d 673, 62 Ill.Dec. 355, 435 N.E.2d 1327.) This is not to say that an accused must make two separate requests for counsel for fifth and sixth amendment purposes. The right to counsel is not dependent on a request by the defendant. (Brewer v. Williams.) Courts, however, must engage in separate inquiries to determine constitutional

violations of those rights. See Edwards v. Arizona.

The majority concludes that because of the sixth amendment violation the State was not entitled to show either that the testimony and photographic evidence of pretrial identification or that the in-court identification had an independent source. The majority's conclusion is contrary to the interpretation of the Wade-Gilbert exclusionary rule. (See Moore v. Illinois.) Even if a lineup identification violates an accused's sixth amendment right, subsequent in-court identifications are still admissible if based on a source independent of and untainted by the lineup identifications. United States v. Wade (1967), 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149;

People v. McDonald (1975), 62 Ill.2d 448, 343 N.E.2d 489.

The record reveals that both Buckle and Harris had ample opportunity to view defendants the evening of the robbery. Buckle testified that the liquor store had fluorescent lighting and that defendants were in the store approximately 15 minutes. Buckle had face to face conversations with both defendants and observed them at a close distance while they removed money from the safe and cash registers. Immediately after the robbery, Buckle described the physical characteristics of the robbers to the police. Those descriptions substantially matched the actual descriptions of Curtis and Ryder. Buckle identified both defendants from an array of five photographs, one

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week before defendants' arrest and line-up.

Harris testified that she observed both defendants in the store prior to the actual robbery and that she was standing approximately five feet from the black man and seven feet from the white man. Harris also observed defendants during the 15 minute robbery and thereafter furnished a description to the police which matches defendants' actual descriptions. Harris viewed a photographic array and stated that defendants' photographs looked similar to those of the robbers.

The testimony of both witnesses reveals no discrepancy between any pre-lineup descriptions and defendants' actual descriptions nor any failure to

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identify defendants on a prior occasion. (People v. Marshall (1977), 47 Ill.App.3d 784, 8 Ill.Dec. 129, 365 N.E.2d 367.) The trial court had ample evidence that the in-court identifications of defendants were based upon origins independent of the lineups and, therefore, the absence of defense counsel at the lineups does not require reversal on appeal. (People v. McDonald; People v. Giovanetti (1979), 70 Ill.App.3d 275, 26 Ill.Dec. 241, 387 N.E.2d 1071; People v. Shorter (1978), 59 Ill.App.3d 468, 16 Ill.Dec. 640, 375 N.E.2d 513.) The fact that there were 20 months between the crime and the lineup identification by Buckle and identification from the lineup photographs by Harris is not determinative. In People v. Martin (1970), 47 Ill.2d

331, 265 N.E.2d 685, cert. denied (1971), 403 U.S. 921, 91 S.Ct. 2240, 29 L.Ed.2d 700, the court found that despite a time lapse of approximately two years between the robbery and photographic identifications and over three years between the crime and trial, the delay did not preclude independent observations.

I note also that, since Ryder's lineup identifications were suppressed by the trial court, Buckle did not testify that he had identified Ryder at the lineup. If there were any illegality connected with that lineup identification of Ryder, it would have been dissipated by Buckle's observation of Ryder independent of the lineup. The fact that Harris stated that the photographs of each defendant "looked like" the men who robbed

the store and did not make a positive identification until viewing the lineup photographs does not make her in-court identification less reliable. (See People v. Anton (1981), 100 Ill.App.3d 344, 55 Ill.Dec. 745, 426 N.E.2d 1070.) Further, defendants make no contention that the lineups or photo identification procedures were unnecessarily suggestive, nor does the record so indicate. (See Manson v. Brathwaite (1977), 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140; Simmons v. United States (1968), 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247.) Additionally, the sixth amendment does not require that defense counsel be present when a witness views photographic arrays. (United States v. Ash (1973), 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619.) There-

fore, both witnesses' testimony about the pretrial identifications from the photo array for each defendnat was proper.

Harris' testimony that she identified defendants from photographs of the lineups and the introduction of those photographs into evidence was proper. The majority concludes that since the uncounseled lineups violated defendants' sixth amendment right, this testimony and evidence were a direct result of the constitutional violation and should have been excluded. As I have noted, I believe that the trial court was justified in finding that Curtis waived his right to an attorney at the lineup. Consequently, there was no primary illegality as to his lineup and the subsequent pho-

tographic identification and testimony by Harris were not tainted, nor was the introduction into evidence of the lineup photograph. While the trial court suppressed the lineup identification of Ryder by Buckle, Ryder had no right to an attorney at a photographic display. (United States v. Ash.) Moreover, assuming that the admission of evidence concerning Harris' photographic identification of either defendant was tainted, such introduction was harmless error because Harris had a clear and independent opportunity to view defendants during the occurrence and made a positive in-court identification. (United States v. Wade; People v. Strater (1979), 72 Ill.App.3d 486, 28 Ill.Dec. 620, 390 N.E.2d 979.) Since any error in the

admission of the photographs or Harris' testimony was harmless, it is not a ground for reversal on appeal. Chapman v. California (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705; People v. McDonald.

Accordingly, I would affirm the judgments of convictions as to both defendants.

No. 61819

IN THE

SUPREME COURT OF ILLINOIS

People State of Illinois,	)	
Appellant	)	
v.	)	AC1-83-2339 and AC1-83-2395
	)	TR81C1548
James Curtis and Andrew Ryder,	)	
Appellees	)	

ORDER

This matter has come for consideration upon the motion of ___appellee___ to stay the mandate of this Court pending appeal or application for certiorari in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed

pending the filing of a notice of appeal or an application for certiorari or the expiration of the period within which said application or notice may be filed. If certiorari is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or certiorari may be sought.

_____

Justice, Supreme Court of Illinois

61819

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL 62706
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September 26, 1986

Mr. Wilson Frost
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No. 61819 - People State of Illinois, appellant, v. James Curtis, et al., appellees. Appeal, Appellate Court, First District

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on October 6, 1986.

TRANSCRIPT 2-3

. . . .

THE COURT: All right. This matter comes up on hearing on the defendant's motion, Ryder's Motion, to suppress identification, which is in writing and on file. Also there is a motion on behalf of Mr. Curtis to join in the motion of Mr. Ryder.

. . . .

Gentlemen, having read the motion-- This is not by way of any limitation in anyway, but as I read the motion, to clarify the issue, it would seem to the Court that the allegations are that the defendants were asked to stand in a line-up subsequent to being formally charged. Secondly, that the lineup was suggestive. And third, that there is no independent

basis for an in-court identification.

. . . .

TRANSCRIPT 251

. . . .

Relative to Petitioner, Curtis, the Court finds:

Based on the facts and circumstances and the evidence that I heard that he did in fact waive his right to have Counsel present at the line-up. Therefore, his motion to Suppress the Line-Up Identification is denied. And, likewise, I find there was no suggestibility relative to the photographic spread display or the line-up photographic identification either before or after the entire procedure was not suggestive.

Therefore, the motion to Suppress the- which he joined in Defendant-

Petitioner-Defendant Ryder's petition, motion to Suppress the Photographic Identification either before or after the line-up is denied.

TRANSCRIPT 354-55

. . . .

MR. TUITT: . . . we have learned throughout discovery, and the State can correct me if I am wrong, Miss Harris did not attend the lineup, but what they did was take a picture of the lineup and bring it to her, to show her the lineup.

She made an identification through the picture, which is the fruit of the lineup which has been suppressed. We submit, therefore, they cannot now, having made that identification out of the photo of the lineup which has been suppressed with respect to Mr. Ryder, at-

tempt to come into court two and half years later and try to make an in-court identification.

The sequence of events is a robbery in June of '80 or July of '82 -- I am sorry, of '79 -- and an arrest and lineup of February of '82 and now, a trial in August of '83. She never looked at anybody in person, in four years, and she's looked at a lineup photo of which the lineup has been suppressed with respect to my client.

So we move to exclude any attempt to make an in-court identification with respect to Mr. Ryder at this late date, as a result of the interplay of the lineup photo.

. . . .

TRANSCRIPT 359-60

MR. HARDIMAN: . . . . Your Honor, at this time, I would renew my motion also to suppress the one that was denied earlier.

To refresh the Court's recollection, during that motion, basically, Mr. Curtis had also testified that he had a lawyer and that he did not wish to make a statement that night, and the only difference in terms of informing the police officers that he had a lawyer, he indicated that he had two lawyers. He wasn't going to contact one that night, as he did not know what he wanted to do about the case.

Again, it would be our position, in renewing our motion, that was sufficient to have caused the police to stop questioning.

. . . .

THE COURT: . . . . The former ruling on Mr. Curtis will stand. The motion today is denied for the same reasons that I found, which is in the transcript, on Mr. Curtis.

. . . .